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No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGIA PATSY,

Petitioner,

—v.—

BOARD OF REGENTS OF THE STATE OF FLORIDA, a body corporate, for and on behalf of Florida International University,

Respondents.

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR CERTIORARI

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In the Supreme Court of the United States

October Term, 1980

No. 80-1874

Georgia Patsy, Petitioner

v.

Board of Regents of the State of Florida, a Body Corporate, for and on Behalf of Florida International University, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR CERTIORARI

Respondents oppose the petition for certiorari on three grounds: (1) the petition is premature (Opposition 9-11), (2) no real conflict exists between the judgment below and decisions of this Court, other courts of appeals, or Con-

gressional intent (Opp. 12-22), and (3) federal courts lack jurisdiction over petitioner's §1983 employment discrimination claims (Opp. 23-28). None of these arguments has merit.

I. THE PETITION IS NOT PREMATURE AND SQUARELY PRESENTS IMPORTANT QUESTIONS REQUIRING THIS COURT'S RESOLUTION

The central question presented by the petition is whether exhaustion of administrative remedies may ever be required of plaintiffs bringing otherwise ripe §1983 claims. That important question is squarely presented on the present record. No further proceedings on remand concerning the particular administrative remedies available to petition are necessary to answer it, or would be relevant. If Congress has commanded in §1983 that exhaustion may not be required regardless of the particular procedures

available, then that command is violated by the remand and further delay added to the two and one-half years petitioner has already waited for proceedings to begin on the merits of her case. Certiorari is appropriate now to decide whether or not exhaustion in §1983 cases may be required.

Although §1983 could not be used to challenge preliminary, provisional, or non-final decisions not yet effectuated and therefore not yet depriving or certain to deprive a plaintiff of rights secured by law (see Opp. 12 n.8), the complaint (whose allegations must be taken as true) plainly avers that petitioner has been rejected by the university for numerous employment openings because of

intentional discrimination.[1/]

1/ The complaint originally named the university as the defendant. The university moved to dismiss, arguing that it could not be sued under state law, citing Byron v. University of Florida, 403 F. Supp. 49 (N.D. Fla. 1975). Record Excerpts ("R") 26, 32. The district court agreed, noting that the Board of Regents were the proper defendants, since the Board was "the corporate body with the power and capacity to sue and be sued." Fla. Stat. §240.042 (1977). See R. 36. The complaint was amended accordingly to name the Board as the defendants. R.36. Therefore, contrary to respondents' argument (Opp. 11 n.7), the Regents are not sued under respondeat superior, but as the parties legally responsible under state law for the allegedly wrongful conduct. Compare Board of Regents v. Roth, 408 U.S. 564 (1972), Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978), all cases where university decisions concerning individuals were challenged against defendant Boards of Regents. Whether the respondents have "caused" or are legally responsible for the allegedly wrongful conduct remains to be decided on the merits after remand and poses no jurisdictional or other bar to this Court's resolution of the exhaustion questions timely posed in the petition. It should be noted, however, that the decision denying plaintiff (Footnote continued on following page)

II. THERE ARE CONFLICTS BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT, OTHER COURTS, AND CONGRESSIONAL INTENT

A. Respondents' conclusory statement (Opp. 12-13) that the Fifth Circuit's exhaustion requirement rests on reasons not considered by this Court or the circuit courts rejecting the requirement is incorrect, as the cases we have previously cited demonstrate (Pet. 12 n.5 and 13 n. 6).

B. The additional argument (Opp. 13-20) that the decision does not conflict with congressional intent is also erroneous, and is contradicted by defendants themselves, who correctly observe:

(Footnote continued from preceding page) the jobs she sought was discussed with and ratified by the Acting President of the University at a September 27, 1978 meeting. See Reply Br. of Appellant in the Fifth Circuit Court of Appeals, at 1-2.

> Congress chose to enact §1997e because of the perceived inability of the courts to require exhaustion in a context that clearly warranted it (Opp. 18.)

That is precisely the point. Congress plainly believed that courts could not require exhaustion in §1983 cases without additional legislation, and acted accordingly. That belief is controlling. See Cannon v. University of Chicago, 441 U.S. 667, 710-711 (1979) and cases previously cited (Pet. 32). If courts may require exhaustion in all §1983 cases, as the decision below holds, then §1997e was unnecessary and superfluous. Having enacted §1997e, Congress withdrew from the courts whatever interstitial "legislative" power they previously had to require exhaustion in §1983 cases, as Milwaukee v. Illinois, 49 U.S.L.W. 4445, 4447-9 (1981) and other cases previously

cited (Pet. 33-34) make clear. Respondents have pointedly failed to address the fatal impact the rule of those cases has on the Fifth Circuit's decision below. Instead, their argument (Opp. 18-19) rests wholly on the same policy considerations addressed by Congress in enacting §1997e.

C. The argument (Opp. 20-22) that the decision below does not conflict with McNeese does not rebut the points made in the petition (at 35-43). We add only that it is undisputed that the latter stages of the administrative process are staffed by state officials outside the university system, who (like the officials in McNeese) are not able to grant relief even if they were to find for petitioner. See Pet. 39, 40.

III. NO JURISDICTIONAL OBSTACLES PRECLUDE GRANTING THE WRIT

Respondents raise three arguments that assertedly require vacation of the decision below for lack of jurisdiction. (Opp. 23-38). None has merit.

A. Even if applied to respondents,[2/] the Eleventh Amendment at most bars dam-

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2/ This Court has held that the Eleventh Amendment bars damage claims "which must be paid from public funds in the state treasury". Edelman v. Jordan, 415 U.S. 651, 663 (1974), Quern v. Jordan, 440 U.S. 332, 337 (1979). The statutes appended to the Opposition demonstrate that although most funds of institutions in the state university system "shall be deposited in the State Treasury subject to disbursement in such manner and for such purposes as the Legislature may by law provide", designated University funds are "exempt" from state control and "may be deposited outside of the State Treasury". See Fla. Stat. Ann. §240.281 (West 1977), reproduced at Opp. A-13. A judgment paid from such funds deposited "outside of the State Treasury" (derived from alumni association funds, donations, gifts, and other sources specified in §240.281) would not be paid "from public funds in the state treasury" and therefore is not barred by the Eleventh Amendment under the plain language of Edelman and Quern, supra.

ages relief in this case. See R. 34. Because the complaint alternatively seeks injunctive relief, the Eleventh Amendment does not bar this suit. Quern v. Jordan, 440 U.S. 332 (1979); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980); Board of Curators v. Horowitz, supra; Regents of the University of California v. Bakke, supra; Board of Regents v. Tomanio, 446 U.S. 478 (1980).

B. Respondents also contend that Boards of Regents are not "persons" within the meaning of §1983. However, that argument has been explicitly or implicitly rejected in several decisions of this Court. See Regents of the University of California v. Bakke, supra (§1983 suit against a state Board of Regents); Supreme Court of Virginia v. Consumers Union, 446 U.S. at 737 n.16 (noting that question whether Virginia court is "person" was

not before court); Board of Curators v. Horowitz, supra; Board of Regents v. Roth, supra; Board of Regents v. Tommanio, supra.[3/]

C. Finally, respondents oppose certiorari on the ground that petitioner is somehow impermissibly bypassing the requirements of Title VII. (Opp. 25-28).

3/ Lower courts have also concluded that states or state entities may be "persons" within the meaning of §1983. See, e.g., Marrapese v. Rhode Island, 500 F.Supp. 1207, 1210-1211; Beck v. California, 479 F.Supp. 392, 396 (C.D. Cal. 1979); Savage v. Pennsylvania, 475 F.Supp. 524, 529-31 (E.D. Pa. 1979). Roth v. Board of Regents, 310 F.Supp. 972, 974 (W.D. Wis. 1970), rev'd on other grounds 408 U.S. 564 (1972). In any event, as Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 297 (1977) makes clear, the question does not preclude this Court from reaching the questions presented here. See also Supreme Court of Virginia v. Consumers Union, supra (question whether Supreme Court is a person not jurisdictional) (semble).

That argument was not raised below, should not be considered here,[4] and is incorrect. Purposeful employment discrimination by public employers was actionable under §1983 both before and after enactment of Title VII and its application to governmental employees.[5] Petitioner has not relied on §1983 to assert rights created by Title VII, but has sued to enforce rights secured by the Fourteenth Amendment. Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366 (1979), is therefore inapposite. Compare Opp. 25-26.

4/ The question whether §1983 is available in light of Title VII is the kind of question the Court has held not jurisdictional. Lake Country Estates v. Tahoe Planning Agency, 440 U.S. 391, 398 (1979); Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 279, 281 (1977).

5/ See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 309 n.15; Johnson v. City of Cincinnati, 450 F.2d

(Footnote continued on following page)

CONCLUSION

For these reasons, and the reasons set forth in the petition, the Court should grant the petition for a writ of certiorari, and should summarily reverse the judgment below. In the alternative, certiorari should be granted, and the Court should set the case for full argument or vacate the judgment below and remand for reconsideration in light of 42 U.S.C. §1997e.

(Footnote continued from preceding page) 796 (6th Cir. 1971). Cf. Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975). See H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 18-19 (1971) (emphasizing preservation of all existing rights); 118 Cong. Rec. S1450 et seq., S1523-26, and 1793-97 (daily ed. Feb. 8, 9, and 15, 1972) (debate on and defeat of amendment to make Title VII exclusive employment discrimination remedy).

Respectfully submitted,

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